No. 11730.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LEONARD JOSEPH MORANDY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLEE'S BRIEF.

Jurisdictional Statement.

A. The United States District Court for the Southern District of California had jurisdiction of appellant and the subject matter.

B. This Court has jurisdiction of the appeal.

C. The offense charged was triable by the District Court under authority of Title 18, United States Code, Section 408, wherein the offense was defined, and of Title 28, United States Code, Section 41, Subdivision 2, which confers jurisdiction to try the case upon the District Court. This Court has jurisdiction of the appeal, under the provisions of Title 28, United States Code, Section 225 (a) and (d), which treat of the jurisdiction of Courts of Appeal.

Statement of the Case.

On August 20, 1947, appellant was indicted by the Grand Jury for the Southern District of California. The Indictment contained one count, wherein appellant was charged with violation of United States Code, Title 18, Section 408, variously known as the Dyer Act and the National Motor Vehicle Theft Act.[1] He was accused of transporting a certain stolen motor vehicle, namely, a 1942 Mercury Convertible Coupe, Motor No. 99A-506084, from Whiting, Indiana, to Santa Barbara County, California, having knowledge that the motor vehicle had been stolen. Trial was had on September 9 and 10, 1947. The jury returned a verdict of "Guilty." On October 12, 1947,

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[1] "*Motor vehicles and aircraft; transportation, etc. of stolen vehicles and aircraft.*

"This section may be cited as the National Motor Vehicle Theft Act. The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails and the term 'aircraft' means any contrivance now known or invented after September 24, 1945, used, or designed for navigation of or for flight in the air; the term 'interstate or foreign commerce' shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia. Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both. Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle or aircraft has been transported or removed by such offender. As amended Sept. 24, 1945, c. 383, §§1, 2, 59 Stat. 536."

he made an alternate motion for new trial and judgment of acquittal. These motions were denied and appellant was sentenced to imprisonment for a period of three years in the custody of the Attorney General. On October 16, 1947, after having filed Notice of Appeal herein, appellant made oral application to the Court, wherein he was convicted for admission to bail pending appeal. The motion was heard by Honorable Leon R. Yankwich, District Judge, upon oral notice and was denied. The Court at that time made a statement finding that there was no substantial question on appeal and in that statement, discussed the reasons why the Court found there was not a substantial question on appeal and directed the United States Attorney to submit a transcript of the proceedings had on that day should a motion for bail on appeal be made in this Court. A transcript of the proceedings in the District Court on motion to fix bail on appeal has heretofore been filed in this Court. Therein the Trial Judge incorporated by reference his remarks in denying a motion for new trial. The proceedings on motion for a new trial are reported in Vol. II of the Transcript of Record at page 142. The remarks of the Trial Judge commence at page 149.

Questions Involved in the Appeal.

The questions in this appeal appear to be:

1. Is the Evidence Sufficient to Support the Verdict of Guilty?

2. Did the District Court Commit Reversible Error in Denying Appellant's Motion for a Bill of Particulars?

3. Did the District Court Adequately Instruct the Jury?

Synopsis of Testimony.

On February 5, 1946, Hope W. Bloemen was the owner of a 1942 green Mercury Convertible Club Coupe [Rep. Tr. 3]. She last saw the vehicle that day [Rep. Tr. 4]. She lived in Lowell, Indiana [Rep. Tr. 8]. The motor number of the vehicle was 506084 [Rep. Tr. 6-7]. It bore Indiana license plates [Rep. Tr. 3].

On said day Mrs. Bloemen's husband drove it to his place of employment in Whiting, Indiana, and parked it on the street at about 8 A. M. [Rep. Tr. 12-13]. When he returned for it at 4:30 P. M. that day, it was gone. He had not given anyone permission to remove it and has not seen it since [Rep. Tr. 13]. Mrs. Bloemen had given permission to her husband to take the car but had not given anyone else such permission [Rep. Tr. 15].

On April 6, 1946, appellant registered at an auto court in Oxnard, California. He used the alias John R. Harrison and printed the name on the auto court register [Rep. Tr. 73-77]. At that time he was in possession of a green Convertible Mercury Coupe, which bore a Minnesota license plate and to which there was attached a trailer which had an Iowa license plate [Rep. Tr. 76]. A man whose true name was John Richard Harrison had been the victim of a theft from his parked automobile in Chicago in 1945. He had been a lieutenant in the parachute troops. Among the things stolen were two so-called "dog tags" being Army identification tags [Ex. 4]. Appellant was a stranger to Mr. Harrison [Rep. Tr. 93-95].

Appellant left Mrs. Rainer's auto court April 13, 1946, having paid for an additional week's accommodation. He left the trailer in the camp and never returned. He did not leave a forwarding address. In April, 1946, he appeared in Paso Robles, California, and showed a relative by marriage a green Convertible automobile and referred to it as his car [Rep. Tr. 38-44]. At about the same time Jack Loy, a sixteen year old high school student, had a conversation with appellant at Paso Robles in the course of which appellant said he had traded an automobile for one he then displayed to the witness. The car thus shown was a green Convertible Mercury. Late in 1945 appellant had represented himself to a new acquaintance to be John Harrison [Rep. Tr. 91].

On April 10, 1946, a Santa Maria, California, police officer had a conversation with appellant in that city. At that time appellant told the officer that his name was Friedman. He displayed identification papers which the officer returned to him. Said papers contained an Army identification card permitting one Friedman, an Army officer, to leave an Army Base, and showed military records of promotion of an officer in the Army through various ranks up to Major. The police officer testified that he had returned the papers to the appellant, but said he thought the name shown was Leonard Friedman [Rep. Tr. 65-68]. On April 11, 1946, Arnold Reiland, Identification Officer and Fingerprint Technician in the Santa Maria Police Department [Rep. Tr. 22-28] took appellant's fingerprints on Government's Exhibit 11. That exhibit is a record of

a case handled by the Santa Maria Police Department against one Morris Friedman, prosecuted for petty theft. All parts of the record showing that it had been taken as part of a criminal prosecution were covered before the exhibit was available to the jury, and all proceedings in which the fact that the record was in connection with an arrest occurred out of the jury's hearing [Rep. Tr. 28-31]. Appellant had signed the name Morris Friedman on the card [Ex. 6] in the presence of the officer who took fingerprints thereon.

A Morris Friedman had been a Major in the Army Air Corps until December, 1945, and an Engineer in Chicago, Illinois, since that time [Rep. Tr. 68-72].

On April 14, 1946, a police officer of the City of Santa Maria, California, found a 1942 green Mercury Convertible Coupe, bearing Minnesota license plates, parked on a public street in Santa Maria [Rep. Tr. 16-18]. He searched the car and found an Iowa 1946 license plate [Ex. 1] under the floor mat. At another place, under the floor mat, he found a Michigan 1946 license plate [Ex. 2]. On the rear of the car was a 1946 Minnesota license plate [Ex. 3]. The ignition keys were in the ignition switch and attached to the same chain was Government's Exhibit 4, the two name plates bearing the name John R. Harrison [Rep. Tr. 19], which Mr. Harrison had identified as his Army "dog tags" and which had been stolen from his automobile in Chicago in 1945 [Rep. Tr. 93-95].

Identification Expert Reiland, of the Santa Maria Police Department, examined the car for latent fingerprints

[Rep. Tr. 22-24] and found one on the chrome molding of the right window [Rep. Tr. 27, 31; Ex. 5]. He compared that print with those which had been taken by him from the appellant three days before [Ex. 6; Rep. Tr. 32]. The fingerprint taken from the car was identical to that of the left index finger of appellant [Rep. Tr. 33].

On April 11, 1946, the same day appellant's fingerprints were taken by the Santa Maria Police Officer, one Charles Taylor gave appellant a ride in a County car from Santa Maria to Santa Barbara. Appellant told Taylor he was going to Oxnard, and did not say anything about an automobile [Rep. Tr. 84-86]. This was three days prior to discovery of the 1942 green Mercury Convertible Coupe on the street at Santa Maria.

When the automobile involved was found in Santa Maria, Officer Reiland, of that City's Police Department, examined the motor of the car and found the motor number to be 99A506084. He recorded that fact on Exhibit 5 which also contains the fingerprint of appellant which had been found upon the vehicle [Rep. Tr. 50-51; Ex. 5]. The ignition key was in the lock, and was attached to a chain to which Mr. Harrison's "dog tags" were also attached.

ARGUMENT.

The Verdict of Guilty Is Supported by the Evidence.

The motor vehicle involved was described by its owner as (1) a 1942 (2) green (3) Mercury (4) Convertible (5) Coupe (6) Motor Number 506084 (7) licensed in Indiana and stolen in that state February 5, 1946.

On April 6th appellant was seen in possession of the automobile. He registered at an Oxnard, California, auto court that day. To the circumstance of possession shortly after the theft, he added these indicia of guilt: (1) He registered under an assumed name, using the name of a man who had lost certain identification material in a theft; (2) He was in possession of some of said material; (3) He printed, rather than wrote, his name on the register. It is common knowledge that handwriting experts find difficulties in comparison of printing which are not present in studying written matter; (4) Seven days later he left the auto court, one week before his paid rental would have expired; (5) He did not leave a forwarding address; (6) He abandoned a trailer he had brought with him; (7) The automobile and trailer bore (without explanation) license plates from different states; (8) Shortly thereafter appellant displayed the automobile to friends in Paso Robles and claimed it to be his property; (9) Four days after leaving Oxnard, appellant was fingerprinted by police in Santa Maria; (10) On being questioned by police at that time, he gave another alias, different from Harrison; (11) The new alias was the true name of an Army Officer some of whose papers ap-

pellant possessed; (12) He signed said alias to his fingerprint record in the police station and was prosecuted under the same alias, Morris Friedman; (13) The same day he started a return trip to Oxnard, accepting a ride in another man's automobile (14) leaving the stolen green Mercury Convertible Coupe unclaimed and unprotected parked on the street at Santa Maria unlocked and with the key in the ignition switch (15) containing the name plates which had been stolen from John R. Harrison, whose name he had used except on the occasion of being questioned and fingerprinted by police at Santa Maria; (16) In the stolen motor vehicle thus abandoned by him were hidden other foreign license plates the possession of which has never been explained.

It is significant that appellant, whose true name is Morandy, hid under the alias of Harrison when in Oxnard, but when involved with the police in Santa Maria four days later, suddenly switched his alias to Friedman. At the time of this change in names the stolen automobile, containing Mr. Harrison's Army "dog tags" in the key chain, was parked on a public street in Santa Maria. Appellant made his peace with the law enforcement authorities in that city, and, under a name disassociated with his use and possession of the stolen motor vehicle, left town as a rider in another car, abandoning the expensive stolen car rather than risk being connected with that vehicle. Under the circumstances of a contact with the police, Morandy, who had posed as Harrison, assumed the cloak of Friedman and abandoned use of the alias which appeared on the ignition key chain of the stolen car. He took "flight" from the loot as well as from the name that connected him with it.

The following cases hold that unexplained possession of stolen property shortly after the theft is evidence of guilt:

Di Carlo v. United States, 64 F. (2d) 15 (C. C. A. 2d);

Wolf v. United States, 36 F. (2d) 450 (C. C. A. 7th);

Boehm v. United States, 271 Fed. 454 (C. C. A. 2d);

Pearlman v. United States, 10 F. (2d) 460 (C. C. A. 9th) (Auto Case);

Girson v. United States, 88 F. (2d) 358 (C. C. A. 9th), cert. den. 301 U. S. 697;

Wilkerson v. United States, 41 F. (2d) 654 (C. C. A. 7th) (Auto Case);

Wilson v. United States, 162 U. S. 613.

The law on sufficiency of evidence declared in those cases is epitomized in *Wilkerson v. United States,* 41 F. (2d) 654, at 657, as follows:

> "The remaining fact to be proved by the government to warrant conviction is that appellant, at the time he purchased the auto, knew that it was stolen property. Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. This presumption applies as well to a person charged with unlawfully receiving stolen goods as to one charged with its original taking. If it raises a presumption of guilt as to the more serious crime, much more should it be evidence of the guilt implied in the

lesser offense. It is a question for the jury whether the inference of appellant's guilty reception of the automobile, arising from his possession thereof within a short time after the theft, was overcome by the explanation. Rosen v. United States (C. C. A.), 271 F. 651; Drew v. United States (C. C. A.), 27 F. (2d) 715; Wilson v. United States, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090. Appellant acquired possession of the auto within 16 days after it had been stolen, and while presumption of guilt, flowing from possession of recently stolen property, grows weaker as the time of the possession recedes from the time of the theft, yet it is for the jury to determine when the inference of guilt is overthrown by the length of possession."

Appellant has attacked the identification of the motor vehicle; claiming it to be insufficient because the owner of the stolen automobile, in giving the motor number recalled the number to be 506084. The Santa Maria Police Officer found, on examining the motor, that said number was preceded by the symbol 99A. In commenting on this argument at the time of ruling on motion for a new trial, the District Judge said [Rep. Tr. 154]:

"On the question of ownership we find that this coupe, first of all, was not an ordinary model car. It was a Mercury Convertible; it was a green Mercury convertible; it was a green Mercury convertible coupe. The year was 1942. The engine is not a movable part. It isn't like a wheel. It is a part which, of course, in the modern automobile can be taken apart. But, as a matter of fact, it has more permanence than any other part of the automobile, and the mere removing of it is a very, very difficult mechanical operation. No one but a skilled mechanic can re-

> move an engine from a car. It isn't like a wheel or a spare tire, which anyone can remove who knows how to handle a jack. The engine was identified by the owner by the last numbers thereof."

Appellant contends that there is a variance between pleading and proof because the true owner in recalling the motor number, aided in memory by a memorandum, failed to recall that portion of the number which preceded the hyphen, namely 99A. This argument overlooks the fact that the automobile was otherwise well described and the identification officer of the Santa Maria Police Department found the motor number to be exactly as stated by the owner, plus the prefix 99A. Hence, there is testimony in the record by which every mark of identification mentioned in the indictment is recited in the evidence. This is more than this Court required in *Pearlman v. United States,* 10 F. (2d) 460 (C. C. A. 9). In that case the indictment referred to the motor number as 18664. The true motor number was found to be 61-A-130. The statute under which appellant was convicted is not one which denounces the interstate transportation of stolen motors, but rather, of stolen motor vehicles.

This Court in commenting on the failure of an appellant to explain possession of stolen goods, said:

> "* * * We believe it is apparent from the complete instruction that, if the jury found (1) that appellants were in possession of property alleged to be stolen, (2) which was in fact stolen, then, in the absence of an explanation justifying the possession, it was a circumstance tending to show guilt. We believe that to be a correct statement of the law * * *."
>
> *Girson v. United States,* 88 F. (2d) 358 (C. C. A. 9).

In the case now before the Court, appellant never made any explanation of his possession except that in the testimony of Government witnesses it appears that in speaking to certain friends he said that the motor vehicle was his, but qualified that position when the police were after him in another connection by taking care not to even use the name by which he was linked to the car, but rather, to adopt a different alias, abandon the vehicle, and get out of town by courtesy transportation.

The Court Did Not Err in Denying the Motion for a Bill of Particulars.

The granting of a bill of particulars is a discretionary matter.

> *Rubio v. United States,* 22 F. (2d) 766 (C. C. A. 9);
>
> *Robinson v. United States,* 33 F. (2d) 238 (C. C. A. 9).

The bill sought in this case if granted and supplied appellant, could not have aided him. It would not have made any difference to the issue of theft whether the chattel stolen was the vehicle of X or of Y, neither do the place and date of the true owner's acquisition bear upon the issue of whether appellant transported the motor vehicle in interstate commerce knowing it to have been stolen. The demand to be informed of the type of automobile and of the engine number had already been anticipated by reciting those details in the indictment.

The Court Adequately Instructed the Jury.

Appellant's Instruction Number 3 does not correctly state the law. The refusal to give that instruction is cited by him as error. Said instruction as offered was:

> "If the automobile came to rest in the State of California, even after having been stolen, and thereafter was transported by the defendant within the State of California only, the defendant would not be guilty of the offense charged and it would be your duty to acquit him." [Clk. Tr. 25.]

In offering that instruction, appellant ignored the charge that he was accused of having transported the vehicle from a point in Indiana to a destination in California. Had the proposed instruction been given, it would have in effect told the jury to acquit defendant if he had transported the vehicle within California only, after it had come to rest here, *even though he had been the one who brought it to rest in California, after having transported it to this State from Indiana with knowledge that it was stolen.*

Instead of the proposed inaccurate instruction, the Court gave the following:

> "The government has offered evidence to the effect that the Mercury Coupe in question was stolen from its owner on or about February 5, 1946, at Whiting, Indiana, and that this same car was found in the possession of the defendant on or about April 11, 1946, at Santa Maria, California.
>
> "You are instructed that the mere finding of an automobile at a given location is not any proof that the defendant stole the automobile or any proof that he transported it, knowing it to have been stolen.

"The government has the burden of proving: the allegations of the indictment, that is, (1) that the defendant had knowledge that the particular vehicle was stolen, and (3) that he transported the particular vehicle in interstate commerce or across state lines. If the government has failed to prove these essentials of the indictment, or either of them, you must acquit the defendant.

"You are instructed that the possession of stolen property in another state than that in which it was stolen after the theft, raises no presumption that the possessor transported the stolen property in interstate commerce.

"Proof that an accused merely drove a stolen automobile from one point in the state to another point or to several points in the state would not in itself constitute a violation of the statute involved in this case.

"However, the law is that the possession of the fruits of a crime recently after its commission,—namely, here, the automobile, in the absence of an explanation justifying the possession, warrants an inference pointing towards guilt. The inference fades as time elapses.

"You are instructed that if from the evidence you find that defendant transported or participated with others in transporting or causing to be transported the automobile in question from Whiting, Indiana, to Santa Maria, California, knowing at the time that the automobile was stolen, you are to find the defendant guilty as charged." [Rep. Tr. 128-129.]

It is submitted that the instructions as a whole provided the jury with a fair, understandable statement of the law applicable to the case.

Conclusion.

The conviction and judgment rest upon clear and substantial evidence, and the verdict of a properly instructed jury.

It is respectfully submitted that the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

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Attorneys for Appellee.